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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE COMMISSIONER OF CORRECTIONS, STATE OF NEW YORK, and JUSTICES OF THE APPELLATE DIVISION, SECOND DEPARTMENT,

Petitioners,

vs.

DANIEL FULLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Does a state court rule denying a free trial transcript to a criminal defendant who has retained counsel violate the Fourteenth Amendment?

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vs.

DANIEL FULLAN,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Commissioner of the Department of Correctional Services of the State of New York and the Justices of the Appellate Division, Second Department, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals is reported at 891 F.2d 1007 (2d Cir. 1989). It is reproduced in the appendix to the petition at 1a-17a.[1]

[1] Materials appearing in the Appendix to the petition will be referred to as "___a".

The opinion of the district court is reported at 703 F. Supp. 15 (S.D.N.Y. 1989). It is reproduced in the appendix at 18a-21a.

Jurisdiction

The Court has jurisdiction-to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1). The judgment was entered on December 12, 1989.

Constitutional and Regulatory Provisions Involved

United States Constitution, Amendment XIV

> . . . [n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

22 N.Y.C.R.R. § 671.3(b)(3)

> [Every person convicted of a crime has the right] upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, to make application . . . for the assignment of counsel to prosecute the appeal; for leave to prosecute the appeal as a poor person and to dispense with printing, [and for a typewritten transcript of the stenographic minutes to] be furnished without charge to the appellant's assigned counsel . . . .

Statement of the Case

A. *Proceedings in the State Courts*

Respondent Daniel Fullan was convicted on January 6, 1988, in New York Supreme Court, Queens County, of murder in the second degree and kidnapping and robbery in the first degree. He was sentenced to forty-five years to life imprisonment, and is currently incarcerated.

Two days after respondent was sentenced, his retained appellate counsel filed a notice of appeal to the Appellate Division, Second Department. Shortly thereafter, counsel filed a motion in that court to receive a free copy of the trial minutes. On March 1, 1988, respondent's motion was denied with leave to renew upon an affidavit setting forth respondent's full financial situation, including the fees paid to both his trial and appellate counsel, and the source of those funds (25a).

Respondent moved to renew. His motion contained an affidavit stating that he had paid his trial counsel $27,500, and that some of that money had been borrowed. Respondent also stated that he had no assets except for $360 in his commissary account. Nonetheless, he wrote, he had been able to retain counsel on appeal because his family and friends had secured $10,000 for such services. He added that "no money [was] available for the purchase of trial transcripts" (24a).

On June 9, 1988, the motion to renew was denied (22a). The New York Court of Appeals denied leave to appeal on August 5, 1988 on the ground that the order was not appealable (A19).[2]

B. *Proceedings in the Federal Courts*

On August 31, 1988, respondent, by his retained appellate counsel, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of New York. He claimed that the Appellate Division's order denying his application for a free transcript deprived him of his constitutionally guaranteed right to appeal his conviction and violated his rights under the equal protection and due process clauses of the Fourteenth Amendment (A8). Petitioners replied that federal habeas jurisdiction was lacking, that respondent has not exhausted his available state court remedies and that respondent's rights had not been violated. Petitioners explained that the Appellate Division's order had been

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[2] Materials not included in the Appendix to the petition but which appeared in appellant's Appendix filed in the Court of Appeals shall be referred to as "A ___".

based upon section 671.3(b) (3) of the rules of the Appellate Division, Second Department, which gives each person convicted of a crime the right

> upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, to make application . . . for the assignment of counsel to prosecute the appeal; for leave to prosecute the appeal as a poor person and to dispense with printing, [and for a typewritten transcript of the stenographic minutes to] be furnished without charge to the appellant's assigned counsel. . . .

22 N.Y.C.R.R. § 6713(b)(3). This rule bars a defendant who is able to retain counsel from receiving minutes paid for by the government. Petitioners contended that rule § 671.3(b)(3) did not unconstitutionally deprive petitioner of his right to appeal.

In an opinion dated January 20, 1989, the district court (Sweet, J.) rejected petitioners' procedural arguments, found for petitioners on the merits and upheld the constitutionality of Second Department Rule § 671.3(b)(3). The district court ruled:

> [N]o authority has been cited to establish that the Constitution requires a state to provide free trial minutes to a defendant who has access to substantial funds for purposes of appeal. [Respondent], whose family and friends have raised $10,000 for his appeal, is in no different a position than the defendant who has $10,000 of his own money to spend on appeal. [Respondent] has failed to prove the requisite financial need. The New York State courts have denied [respondent] indigent status, and no error of constitutional magnitude has been demonstrated with respect to that determination. . . . An indigent defendant whose friends and family are willing to hire a lawyer for the defendant at their expense has no right to a free copy of the trial minutes.

On February 9, 1989, the district court issued a certificate of probable cause. 28 U.S.C. § 2253 (A47).

Respondent appealed to the United States Court of Appeals for the Second Circuit. In an opinion and judgment dated December 12, 1989, the court of appeals, by two to one vote, vacated the judgment of the district court. The majority, after concluding that respondent was in custody within the meaning of 28 U.S.C. § 2254, held that the State could not treat the funds of family and friends as assets of the defendant unless he had discretionary use or other control over them. The court further ruled that New York State had no right to dictate to family and friends how to spend their money and, therefore, it had no right to require that a defendant choose between forgoing retained counsel and forgoing an appeal. The court remanded the case for a hearing to determine whether respondent was indigent or had exercised control over the money used to retain appellate counsel. The court ordered that if, at the conclusion of the hearing, the district court found that respondent was indigent or had no control over the funds that were used to retain appellate counsel, it should issue a writ of habeas corpus requiring the state to release respondent unless, within a reasonable period, the state provided him with a free transcript.[3]

The dissent disagreed with the majority on all points.[4] The dissent agreed with the district court that respondent, "whose family and friends have raised $10,000 for his appeal, is in no different a position than the defendant who has $10,000 of his own money to spend on appeal" (15a). It recognized that in applying § 671.3(b)(3), the Appellate Division merely attributed

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[3] By order dated February 4, 1990, the district court stayed the hearing pending determination of this petition.

[4] Preliminarily, the dissent reasoned that respondent had not challenged the constitutionality or legality of his confinement, and that therefore habeas jurisdiction was not present (13a). The dissent also believed that respondent had not exhausted his state court remedies because he had not "fairly presented" his claim to the Appellate Division, citing *Daye v. Attorney General of New York*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1048 (1984)(14a).

to respondent the non-contingent benefactions of others. The dissent concluded that because the Constitution does not require a state to provide a free transcript to a defendant who has access to substantial funds for purposes of appeal, the Second Department's Rule § 671.3(b)(3) did not violate the Fourteenth Amendment, facially or as applied to petitioner (16a).

Reasons for Granting the Writ

The opinion of the court of appeals announces a new rule that ignores money contributed by friends and family to hire appellate counsel in determining whether a defendant is eligible for a trial transcript at state expense. This rule has a far-reaching impact and threatens to overwhelm courts already hampered by a scarcity of funds.

Petitioners submit that the court of appeals committed error in ruling that a defendant may receive a free trial transcript even though he is represented by appellate counsel retained by family and friends. *Griffin v. Illinois*. 351 U.S. 12 (1956), the landmark case establishing the right of indigent defendants to be provided with a copy of their trial minutes, also recognized the state courts' "broad power to promulgate rules of procedure and appellate practice." *Id.* at 20. In New York, the Appellate Division of the state supreme court is charged with the duty of appointing counsel and securing trial transcripts at government expense for those defendants who lack the financial resources to perfect an appeal to that court. New York County Law § 722(4); New York Criminal Procedure Law § 460.70. At the same time, the Appellate Division must act responsibly to ensure that taxpayers' money is not squandered in cases where defendants are in fact able to bear the costs of their appeals.

If the state were to bear the expense of providing a trial transcript to respondent, it would be required to order two copies, at a cost of $1.375 per page. New York Criminal Procedure Law § 460.70; 22 N.Y.C.R.R. § 108.2(b). Thus, given the District Attorney's estimate of a 700 page transcript in respondent's case (A26), the cost to the state in this case alone would be $1,925.

The Appellate Division's determination that respondent was not entitled to a free transcript was in accordance with section 671.3(b)(3) of the Court's rules, which gives each person convicted of a crime the right "upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, to make application . . . for the assignment of counsel to prosecute the appeal; for leave to prosecute the appeal as a poor person and to dispense with printing, [and for a typewritten transcript of the stenographic minutes to] be furnished without charge to the appellant's assigned counsel . . .". Under this section, which specifically allows only assigned counsel to receive transcripts at state expense, retained counsel are prohibited from receiving minutes paid for by the government.

Contrary to the majority's opinion, application of this rule to respondent did not violate his right to due process or equal protection under the Fourteenth Amendment. The Constitution does not require a state to provide free minutes to a defendant who has access to substantial funds for purposes of appeal. As the dissent recognized, once friends and relatives raised $10,000 for respondent's appeal, in effect providing him with a large sum of money as a gift, he was in no different a position than the defendant with $10,000 of his own money to spend on appeal. In placing respondent on a par with such a defendant, who must allocate his available resources between attorney fees and transcript costs, section 671.3(b)(3) is "free of *unreasoned* distinctions," *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) (emphasis added) and provides respondent with an "adequate opportunity to present [his] claims fairly within the [appellate] system." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

The majority's assertion that New York's rule "require[s] that the defendant choose between forgoing retained counsel and forgoing an appeal" (11a) is inaccurate. Respondent would not be forced to forgo retained counsel if he bought his own transcript. If respondent could not secure a fee reduction from his present attorney, and use the money saved to purchase minutes, he could retain a lawyer who would perfect the appeal for less money. By ignoring this possibility, the majority's

determination assumes an entitlement to counsel of first choice, when, of course, no such right exists. *Caplin & Drysdale, Chartered v. United States*, 109 S.Ct. 2646, 2652 (1989); *Wheat v. United States*, 108 S.Ct. 7692, 7697 (1988); *United States v. Allan*, 789 F.2d 90 (1st Cir. 1986), *cert. denied* 479 U.S. 846 (1987). Indeed, as the dissent below noted, the rule espoused by the majority invites widespread abuse because "[t]here is nothing to prevent supporters of criminal appellants from raising $25,000, $50,000 or $100,000 for a defense fund expressly limited to paying 'attorneys fees' only for a more expensive criminal defense lawyer" (16a-17a).

As the dissent also noted, an additional effect of the majority's holding is to require state courts to engage in detailed fact-finding regarding the source of counsel fees and the complicated financial relationships that might exist between defendants and their benefactors. Because respondent in this case was provided with the gift of a substantial sum of money for appeal purposes, such inquiry should not be necessary.

In sum, the court of appeals erred in equating respondent's situation with that of an indigent. Its opinion, if permitted to stand, will enable large numbers of criminal defendants who have access to substantial sums of money to retain high-priced counsel and yet receive trial transcripts at taxpayers' expense. This Court should review the court of appeals' judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 9, 1990

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 102—August Term, 1989

(Argued: September 20, 1989

Decided: December 12, 1989)

Docket No. 89-2154

DANIEL FULLAN,

Petitioner-Appellant,

—v.—

COMMISSIONER OF CORRECTIONS OF THE STATE OF NEW YORK AND THE JUSTICES OF THE APPELLATE DIVISION, SECOND DEPARTMENT,

Respondents-Appellees.

Before:

VAN GRAAFEILAND, MESKILL, and KEARSE,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, denying petition for a writ of habeas corpus

alleging denial of trial transcript necessary for direct appeal by indigent prisoner.

Vacated and remanded.

Judge Meskill dissents in a separate opinion.

IRVING ANOLIK, New York, New York, *for Petitioner-Appellant*.

ELAINE STOGEL, Assistant Attorney General, New York, New York (Robert Abrams, Attorney General of the State of New York, on the brief), *for Respondents-Appellees*.

KEARSE, *Circuit Judge*:

Petitioner Daniel Fullan, a New York State ("State") prisoner who wishes to appeal in state court from his convictions of state crimes, appeals from a judgment of the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1982), which alleged that the state appellate court denied him a free trial transcript despite his indigence. The district court ruled that the State was entitled to deny Fullan a free transcript on the ground that his family and friends had raised funds to retain appellate counsel for him. Fullan contends that the district court erred in failing to hold that the state court rule granting free transcripts only to indigent appellants who prosecute their appeals *pro se* or

with assigned, rather than retained, counsel violates an indigent defendant's rights under the Fourteenth Amendment to the Constitution. To the extent indicated below, we agree, and we vacate and remand for further proceedings.

I. BACKGROUND

In January 1988, following a jury trial in State Supreme Court, Queens County, Fullan was convicted of second degree murder, kidnaping, and robbery; he was sentenced to a prison term of 45 years to life and is currently incarcerated. He is attempting to appeal the judgment of conviction to the State's Appellate Division for the Second Department ("Second Department"). Fullan's family and friends raised $10,000 to retain an attorney to represent him on appeal.

Though not needing assigned counsel, Fullan applied for leave to appeal as a poor person in other respects, asking the court to dispense with printing and to provide his counsel with a free copy of the trial minutes. The Second Department summarily denied Fullan's motion, but stated that the denial was without prejudice to a renewed motion showing his financial condition.

Fullan filed a new motion, supported by his detailed affidavit stating that $27,500 had been paid to his trial counsel and that this sum had been raised by liquidating his total net worth and by borrowing; that he had no assets left other than approximately $360.31 in his commissary account at the Clinton Correctional Facility; that he had received no money while incarcerated; and that the $10,000 paid to retain his appellate counsel had been raised by his family and friends. This motion too was

denied summarily; no reasons were stated. Leave to appeal to the New York Court of Appeals was denied on the ground that the Second Department's ruling was not appealable.

In August 1988, Fullan filed his present petition for habeas corpus in the district court, contending that the Second Department's denial of his motion without a hearing and its refusal to provide him with a free copy of the transcript of his trial minutes denied him appellate review, in violation of his rights to due process and equal protection. He named as respondents the Justices of the Second Department and the State's Commissioner of Corrections. He asked that the Second Department be ordered to provide him with a free transcript, or, if it refused, that the State be ordered to release him from prison. The court directed respondents to answer or move against the petition.

Respondents, in effect, moved to dismiss. An affidavit of a State Assistant Attorney General stated that Fullan's trial had occupied some seven trial days and that a transcript, assuming a 700-page record, would cost $962.50. An affidavit of the Clerk of the Second Department explaining that court's denial of Fullan's motions stated, in pertinent part, that the Second Department

> annually grants poor person relief in approximately 1200 appeals. We have attempted to ascertain from the Office of Court Administration and from the Administrative Judge of the Criminal Courts the amount expended annually to provide minutes to defendants who have been granted poor person relief, but have been informed that such information is not maintained. However, from the large number of such

> determinations granted each year, it is obvious that the cost is very high.
>
> The Justices were concerned because defendant was able to pay $27,500 to retained trial counsel and $10,000 to retained appellate counsel but did not attempt to allocate any funds for the transcripts.
>
> The Justices of the Appellate Division believe that an application such as that filed by counsel would seem to come with ill grace, when the result would be that counsel receives $10,000 for handling the appeal, but the taxpayers of this state would have to bear the cost of paying for the transcript.

In an Opinion dated January 20, 1989 ("Opinion"), the district court denied Fullan's petition, stating that

> no authority has been cited to establish that the Constitution requires a state to provide free trial minutes to a defendant who has access to substantial funds for purposes of appeal. Fullan, whose family and friends have raised $10,000 for his appeal, is in no different a position than the defendant who has $10,000 of his own money to spend on appeal. Fullan has failed to prove the requisite financial need.

Id. at 3. The court cited § 671.3(b)(3) of the Rules of the Second Department, which provides that an appellant in a criminal case has the

> right, upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, to make application to the appellate court for the following relief: for the assignment of counsel to prosecute the appeal; for leave to prosecute the appeal as a poor person and to dispense with printing;

> and if stenographic minutes were taken, for a direction to the clerk and the stenographer of the trial court that a typewritten transcript of such minutes be furnished without charge to the appellant's *assigned* counsel or, if appellant prosecutes the appeal *pro se*, to appellant.

McKinney's 1989 New York Rules of Court § 671.3(b)(3) (emphasis added). The court found that this section, granting a transcript only where counsel is assigned, while denying it where counsel is retained, does not violate a defendant's rights to due process or equal protection

> to the extent that it links a defendant's ability to retain counsel with his ability to pay the costs and expenses of an appeal by prohibiting retained counsel from receiving minutes paid for by the government. An indigent defendant whose friends and family are willing to hire a lawyer for the defendant at their own expense has no right to a free copy of the trial minutes.

Opinion at 3. Judgment was entered dismissing the petition.

Fullan appeals, contending that since he is indigent, he has the right to a free transcript for purposes of appeal despite the fact that family and friends have raised sufficient funds to retain counsel for him. For the reasons below, we conclude that if Fullan himself had no funds with which to prosecute the appeal and had no control over the funds used to retain counsel for him, the State's denial of his application for a free transcript violates his rights to due process and equal protection.

II. DISCUSSION

A. *Habeas Jurisdiction of Fullan's Claim*

Before we reach the merits of Fullan's claim that the denial of a free transcript denies him due process or equal protection, we must consider whether his claim came within the scope of the district court's jurisdiction. Though Fullan's request that the district court order the state court to provide him with a free transcript does not at first blush appear to come within the habeas statute, and "[t]he federal courts have no general power to compel action by state officials," *Davis v. Lansing*, 851 F.2d 72, 74 (2d Cir. 1988), we conclude that Fullan's claim was within the court's habeas jurisdiction.

Section 2254(a) of 28 U.S.C. provides that a district court shall entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Jurisdiction of Fullan's claim under this section is not immediately clear. Fullan is in custody because of his conviction of state crimes. He has not alleged any constitutional flaw in the prosecution or trial, and his primary request for relief is not release from custody but an order compelling the state court to provide him with a free copy of his trial minutes. The granting or denial of the transcript does not immediately appear to affect his custody. He would remain in custody if the state court granted him a free transcript and his conviction were affirmed; he could be released from custody if the state court persisted in its denial of a free transcript but reversed his conviction.

Nonetheless, we are persuaded that habeas jurisdiction is proper because Fullan is not permitted to perfect his appeal without including the trial transcript in his record on appeal. Under the Second Department's Rules, in virtually all cases, including Fullan's, a transcript must be filed in order even to docket an appeal to that court. *See* McKinney's 1989 New York Rules of Court §§ 670.8, 670.16, 670.20; N.Y. Civ. Prac. L. & R. 5526 (McKinney 1978). Though there are a few exceptions to the requirement, respondents conceded at oral argument before this Court that in the circumstances here, Fullan cannot appeal unless he files the trial transcript.

Though our conclusion as to jurisdiction would be different if Fullan could perfect his appeal without filing a trial transcript, thereby allowing the normal collateral review of whether denial of a transcript violated his constitutional rights, we are persuaded that habeas jurisdiction exists in the present case. Fullan is in custody because of his conviction, and though he could be released if he were successful on appeal, he is not allowed to appeal without filing a transcript. Accordingly, we conclude that given the combined effect of the Second Department's decision denying him a free transcript and its Rules preventing him from appealing without filing a transcript, Fullan is in custody within the meaning of § 2254.

B. *The Denial of a Free Transcript*

As a general matter, "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." *Roberts v. Lavallee*, 389 U.S. 40, 42 (1967) (per curiam); *see, e.g., Ross v. Moffit*, 417 U.S. 600 (1974); *Mayer v. City of Chicago*, 404 U.S. 189 (1971);

Draper v. Washington, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956) (plurality opinion); *id.* at 20 (Frankfurter, *J.*, concurring in the judgment). A trial transcript may be such an instrument. Though a state is not required by the Constitution to provide a right of appeal, it is well established that when such a right of appeal is provided, an indigent defendant is entitled to "as adequate appellate review as defendants who have money enough to buy transcripts." *Griffin v. Illinois*, 351 U.S. at 19 (plurality opinion); *see, e.g., Gardner v. California*, 393 U.S. 367 (1969); *Roberts v. LaVallee*, 389 U.S. 40; *Lane v. Brown*, 372 U.S. 477. Thus, the state may be required to provide a defendant with a trial transcript at state expense. ***But see*** *Draper v. Washington*, 372 U.S. at 495 ("[a]lternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise").

Assuming the veracity of Fullan's allegations of poverty in the present case, which respondents have not answered, we disagree with the district court's conclusion that Second Department Rule § 671.3(b)(3) does not violate Fullan's rights to due process and equal protection. We agree with so much of the court's decision as states that "to the extent that it links ***a defendant's*** ability to retain counsel with his ability to pay the costs and expenses of an appeal" (emphasis added) the Rule is valid. If Fullan retained funds, he would not be indigent. Or if he himself had paid appellate counsel, we would agree that he was required to provide for the transcript. Indeed, if Fullan even had discretionary use of the funds raised by his family and friends or had control of them, we would agree with the district court that he was "in no different a position than the

defendant who has $10,000 of his own money to spend on appeal."

But in the state of facts assumed here, respondents focus not on assets owned or controlled by the defendant but rather on assets belonging to his family and friends. This focus is inappropriate, for indigence is personal. The State is not entitled to treat the funds of others, over which a defendant has no control, as assets of the defendant. Nor is respondents' reference to the fact that Fullan paid his trial counsel $27,500 pertinent. This figure is cited as if the sum spent were somehow still retained. The amount of money that has passed from the defendant's ownership prior to the appellate stage is irrelevant unless it was a fraudulent conveyance.

There is no doubt that the expense to the State of providing free assistance to indigent appellants is great. Yet none of the State's other Judicial Departments has a rule denying a free transcript to an indigent defendant for whom appellate counsel has been retained. Further, the expense here would be greater if the State were required to pay the attorney's fee as well as the cost of the transcript. *See* N.Y. County Law § 722 (McKinney Supp. 1989) (each county must implement a plan for providing counsel for those "persons charged with a crime . . . who are financially unable to obtain counsel").

We think there is also little doubt that either a defendant's benefactors or the retained attorney will fare better economically if the State is required to provide a free transcript. Without State provision of a transcript, either the benefactors would advance additional funds or the attorney would agree to a lower fee in order that a transcript could be purchased. Or the State might appoint the attorney (or another attorney) and pay him at statutorily lim-

ited rates. *See* N.Y. County Law § 722-b (McKinney Supp. 1989) (counsel assigned to felony appeals normally limited to maximum fee of $1,200); *cf.* 18 U.S.C. § 3006A(d) (Supp. V 1987) (assigned counsel in federal appeals normally limited to maximum fee of $2,500).

The possibility that a retained attorney will receive what appears to be a very large fee while the defendant's transcript is paid for by the taxpayers is not an attractive scenario, but we cannot conclude that this possibility is dispositive. The determinative consideration is that a state has no right to dictate how the defendants' family and friends will spend their money. Insofar as the state's prosecution of a defendant is concerned, family and friends are bystanders. *Cf. In re Heysham*, 131 Misc. 2d 1007, 502 N.Y.S.2d 636 (Fam. Ct. 1986) (parents of 14-year-old juvenile delinquent not responsible for providing transcript for appeal; their assets not considered in determining 14-year-old's indigence). Bystanders have no obligation to the state; they have no responsibility for the expenses of the person convicted. The state, however, once it has provided a right of appeal generally, does have an obligation to provide the wherewithal for an appeal by an indigent prisoner. Since the state has no right to dictate how the benefactors' money will be spent, it has no right to require that the defendant choose between forgoing retained counsel and forgoing an appeal. *Accord State of New Jersey v. Morgenstein*, 147 N.J. Super. 234 (1977) (defendant's eligibility for free transcript "measured by what he is legally entitled to as an indigent, and not by the contingent benefactions of others"; "the court is not free to instruct [voluntary benefactors] as to how their funds must be allocated").

In sum, though the State takes the position that the application for a free transcript where counsel is to receive $10,000 comes with "ill grace," our conclusion is that if the convicted person is indigent and has not had control over the funds raised to pay his appellate attorney, the State is obligated to provide him with a free transcript.

Accordingly, we vacate the judgment of the district court and remand for further proceedings. Respondents did not answer the petition, and it is not clear whether or not they controvert the factual allegations made in support of the petition. Nor was any hearing held in the state court in connection with the denials of Fullan's applications. Respondents remain free to seek a hearing as to the truth of those allegations and as to whether Fullan ever had control over the funds raised to pay appellate counsel.

If the district court finds that Fullan's financial condition is as he has represented it and that he did not have control over the funds used to retain his appellate counsel, it should issue the writ of habeas corpus requiring the State to release Fullan unless, within such period as the court deems reasonable, the State provides him with a free transcript.

CONCLUSION

The judgment of the district court is vacated, and the matter is remanded for further proceedings not inconsistent with this opinion.

MESKILL, *Circuit Judge*, dissenting:

I respectfully dissent.

Although the majority correctly observes that "[t]he federal courts have no general power to compel action by state officials," *Davis* v. *Lansing*, 851 F.2d 72, 74 (2d Cir. 1988), they are nevertheless "persuaded" that habeas jurisdiction is proper because, under the Second Department's Rules, "Fullan is not permitted to perfect his appeal without including the trial transcript in his record on appeal." I am unpersuaded.

Federal courts have jurisdiction to entertain a petition for a writ of habeas corpus "*only* on the ground that [the prisoner] is in custody in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a) (emphasis added); *see Preiser* v. *Rodriguez*, 411 U.S. 475, 486 n.7 (1973) ("traditional meaning and purpose of habeas corpus [is] to effect release from illegal custody"). However, Fullan's petition challenges neither the constitutionality nor the legality of his incarceration. Instead, Fullan seeks from the federal court only what he failed to obtain from the New York state courts—a copy of his trial transcript at state expense. I cannot conclude that at this time Fullan's "custody" is even arguably in violation of the Constitution or laws of the United States within the meaning of section 2254. Therefore, I do not believe that habeas jurisdiction is present.

Assuming that habeas jurisdiction is proper in this case, Fullan fails to meet another requirement for relief. He must exhaust available state remedies as a necessary prerequisite to applying for federal habeas corpus relief. 28 U.S.C. § 2254(b). We have adopted a two-stage inquiry for determining whether the requisite exhaustion has

occurred. First, the identical federal constitutional claim urged upon the federal habeas court must have been "fairly presented" to an appropriate state court. *Daye* v. *Attorney General of New York*, 696 F.2d 186, 191 (2d Cir. 1982) (in banc), *cert. denied*, 464 U.S. 1048 (1984); *Klein* v. *Harris*, 667 F.2d 274. 282 (2d Cir. 1981). While somewhat regimented, this rule requires that the petitioner must have informed the state court of both the factual and legal premises of the claim he asserts in federal court. *Daye*, 696 F.2d at 191-95; *see Picard* v. *Connor*, 404 U.S. 270, 276-77 (1971). Second, upon being denied relief on his federal constitutional claim in an appropriate state court, the petitioner must have utilized all available mechanisms to secure appellate review. *Klein*, 667 F.2d at 282; *see* 28 U.S.C. § 2254(c).

Fullan satisfied the second prong of the exhaustion test when he sought leave to appeal to the New York Court of Appeals. He has not, however, "fairly presented" his federal constitutional claim to the New York state courts as required under the first prong of the test. Notwithstanding the district court's assertion to the contrary, the papers submitted to the Appellate Division on Fullan's behalf did *not* cite to the United States Constitution, any provisions thereof, or to any federal statute. *Without* case citation or constitutional analysis Fullan's counsel nebulously argued to the Appellate Division only that "under the appropriate decisions of the Supreme Court of the United States and of [New York], this motion should be granted without delay." The majority apparently construes petitioner's bare reference to "decisions of the Supreme Court of the United States" as sufficient to fairly present all federal constitutional claims. I do not. *See, e.g., Taylor* v. *Scully*, 535 F.Supp. 272 (S.D.N.Y. 1982) (holding mere reference

to "principle[s] of due process" insufficient to present constitutional claim).

Furthermore, even assuming that Fullan has exhausted his state court remedies, I cannot conclude that Second Department Rule § 671.3(b)(3) transgresses either equal protection or due process guarantees. As written, section 671.3(b)(3) links an appellant's ability to retain counsel with his ability to pay the expenses incidental to an appeal—not an unreasonable relationship. Upon the requisite proof of an appellant's financial inability to retain counsel, the rule specifically allows either appellant's assigned counsel or appellant, if proceeding *pro se*, to receive a trial transcript at state expense. Retained counsel, however, is prohibited from receiving a transcript without charge. Facially, this dichotomy does not run afoul of Fourteenth Amendment guarantees. Section 671.3(b)(3) is "free of *unreasoned* distinctions," *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966) (emphasis added), and attempts to provide indigents with an "adequate opportunity to present their claims fairly within the [appellate] system," *Ross* v. *Moffitt*, 417 U.S. 600, 612 (1974). *See Griffin* v. *Illinois*, 351 U.S. 12, 16-19 (1956) (plurality opinion).

In applying section 671.3(b)(3), the Appellate Division merely attributed to Fullan the non-contingent benefactions of others in determining whether "his financial inability to retain counsel and to pay the costs and expenses of the appeal" necessitated the provision of transcripts at state expense. Echoing the apparent sentiment of the Appellate Division, the district court concluded that "Fullan, whose family and friends have raised $10,000 for his appeal, is in no different a position than the defendant who has $10,000 of his own money to spend on appeal." I

agree. While every defendant who retains appellate counsel would undoubtedly prefer that the state foot the bill for the trial transcript, the Constitution simply does not require a state to provide a free transcript to a defendant who has access to substantial funds for purposes of appeal. Thus, while Fullan apparently is personally financially unable to retain counsel, the application of section 671.3(b)(3) to him in his circumstances cannot rationally be said to foreclose his right to appeal.

Fullan is not barred from receiving a transcript at state expense. He simply can't get one on his own terms. Furthermore, Fullan is under no compulsion to accept private representation, but may apply for assigned counsel pursuant to N.Y. County Law § 722(4) (McKinney Supp. 1989) and N.Y. Crim. Proc. Law § 460.70 (McKinney 1983). Upon the assignment of counsel, a transcript of the lower court proceedings will be furnished without charge. Having voluntarily accepted private representation, Fullan's contention that *he* was financially unable to retain counsel and therefore should be provided with a transcript at state expense has a hollow ring. It is inconceivable that family and friends who have raised $10,000 for Fullan's appeal would restrict the use of those funds to the payment of counsel fees if they knew that the appeal could not be perfected without a trial transcript. An offer of assistance subject to such a restriction would be empty and self-defeating. An interpretation of section 671.3(b)(3) that equates Fullan's situation with that of an indigent hardly compliments the constitutional protections for indigent criminal appellants under the Fourteenth Amendment.

Finally, the rule espoused by the majority today invites widespread abuse. There is nothing to prevent supporters of criminal appellants from raising $25,000, $50,000 or

$100,000 for a defense fund expressly limited to paying "attorney's fees" only for a more expensive criminal defense lawyer. The majority's holding will also require the Appellate Division to engage in detailed factfinding regarding the source of an appellate attorney's fee and, potentially, the complicated financial relationships that might exist between defendants and their benefactors. This, the Constitution does not require. I would affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL FULLAN,

Petitioner,

– against –

OPINION
88 Civ. 6070 (RWS)

COMMISSIONER OF CORRECTIONS
OF THE STATE OF NEW YORK,

Respondent.

A P P E A R A N C E S:

IRVING ANOLIK, ESQ.
Attorney for Petitioner
225 Broadway
New York, New York 10007

HON. ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Respondent
120 Broadway
New York, New York 10271
By: ELAINE STOGEL
Assistant Attorney General
Of Counsel

Sweet, D. J.

Petitioner Daniel Fullan ("Fullan") seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 based upon the State's failure to provide him as an indigent defendant with a trial transcript free of charge. For the reasons set forth below, the petition is denied.

Facts

On January 6, 1988, Fullan was convicted of second degree murder, kidnapping and robbery after his trial in the Supreme Court of New York State in the County of Queens. He was sentenced to a term of 45 years to life.

On March 1, Fullan moved the Court for a free copy of his trial minutes. Despite Fullan's sworn statement that he was without funds to prosecute his appeal, his motion was denied. A renewed motion made April 29 was denied on June 9, 1988. Leave to appeal to the New York State Court of Appeals was applied for on July 14, 1988 and was denied in an order dated August 5, 1988.

Fullan paid $27,500 in legal fees for his trial, some of which was borrowed. Fullan swears that he is indigent, and that he has only approximately $360 in his commissary account. He contends that he has no money available for the purchase of transcripts which, according to the state, would cost over $900.00. However, Fullan's family and friends have secured $10,000 for legal services for an appeal.

Discussion

Because this case arose in the Appellate Division and an application for Leave to Appeal was denied by the New York Court of Appeals, and because Fullan cited the United States Constitution in his application, Fullan has exhausted state remedies and has afforded the State an opportunity to review his federal constitutional claim. Therefore, this petition is ripe for determination by this court.

It is well-established that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require a state to provide an indigent defendant with a copy of his or her trial transcript. *Griffin v. Illinois*, 351 U.S. 12 (1956). The Supreme Court has elaborated:

> *Griffin v. Illinois* and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when these tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.

Britt v. North Carolina, 404 U.S. 226, 227 (1971), *quoted in United States v. Sliker*, 751 F.2d 477 (2d Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985).

However, no authority has been cited to establish that the Constitution requires a state to provide free trial minutes to a defendant who has access to substantial funds for purposes of appeal. Fullan, whose family and friends have raised $10,000 for his appeal, is in no different a position than the defendant who has $10,000 of his own money to spend on appeal. Fullan has failed to prove the requisite financial need. The New York State courts have denied Fullan indigent status, and no error of constitutional magnitude has been demonstrated with respect to that determination.

Further, § 671.3(b)(3) of the rules of the Appellate Division, Second Department of New York does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution to the extent that it links a defendant's ability to retain counsel with his ability to pay the costs and expenses of an appeal by prohibiting retained counsel from receiving minutes paid for by the government. An indigent defendant whose friends and family are willing to hire a lawyer for the

defendant at their expense has no right to a free copy of the trial minutes.

Conclusion

The facts in this case reveal no grounds for a finding that the state had deprived Fullan of his constitutional rights by refusing to issue free transcripts to him. Fullan's petition for a writ of habeas corpus is therefore denied and the petition dismissed.

It is so ordered.

New York, N. Y.
January 20, 1989

ROBERT W. SWEET
U.S.D.J.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Dated - June 9, 1988

WILLIAM C. THOMPSON, J.P.
RICHARD A. BROWN
MOSES M. WEINSTEIN
STANLEY HARWOOD, JJ.

Motion No. 3314

The People, etc., respondent,
v Daniel Fullen, appellant.
(Ind. No. 2437/86)

DECISION & ORDER ON MOTION

Motion by appellant for renewal and reconsideration of his prior motion for leave to prosecute the appeal from a judgment of the Supreme Court, Queens County, rendered January 6, 1988, as a poor person, dispensing with printing on said appeal and furnishing appellant's counsel with a copy of the stenographic transcript of minutes, without charge to him.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

June 9, 1988 PEOPLE v FULLAN, DANIEL Mot.No. 3314

Received 7/12/88

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

****

State of New York) S.S.:
County of Clinton)

V

Daniel Fullan

****

Daniel Fullan being duly sworn says:

I am the defendant herein and make this affidavit in support of a renewed motion to appeal upon the original record and type written briefs and to be given a copy of the trial transcripts without cost to me.

The following is a full statement of my financial condition and other items required by this Court's order of March 1, 1988 which denied my motion, without prejudice to renewal:

1. I have not received, while in confinement, any money from the following sources;

a-Businesses or any form of unemployment
b-Rent payments, interest, or dividends
c-Pensions, annuities, or life insurance payments
d-Inheritances
e-Nor any form of public assistance

2. I have no money in any checking account or savings account or any form of investment equity.

3. I do not own any real estate, stocks, bonds, notes, automobiles or any household furnishings.

4. I have no assets either real or personal.

5. The liquidation of my total net worth plus borrowed money paid my trial counsel $27,500.00

6. To my knowledge and belief; my parents retained my appeal counsel, securing the necessary monies through family and friends. The amount was $10,000.00 and is the last of their and my resources, leaving no money available for the purchase of trial transcripts.

7. I never received bail.

8. I am presently incarcerated at Clinton Correctional Facility in Dannemora New York and I have $360.31 in my commissary account which represents my total worth.

/s/ Daniel Fullan

Daniel Fullan

SWORN TO BEFORE ME
THIS DAY 22 OF MARCH, 1988

/s/ Henry J. Kaye
Notary Public, State of New York
Residing in the County of Clinton
Commission Expires Sept. 2, 1988

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Dated - March 1, 1988

RICHARD A. BROWN, J.P.
JOSEPH J. KUNZEMAN
SYBIL HART KOOPER
VINCENT R. BALLETTA, JR., JJ.

Motion No. 1332

The People, etc., respondent,
v Daniel Fullen, appellant.
(Ind. No. 2437/86)

DECISION & ORDER ON MOTION

Motion by appellant for leave to prosecute the appeal from a judgment of the Supreme Court, Queens County, rendered January 6, 1988, as a poor person, dispensing with printing on said appeal and furnishing appellant's counsel with a copy of the stenographic transcript of minutes, without charge to him.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied with leave to renew upon appellant's affidavit setting forth his full financial situation, his assets both real and personal, the fees paid to both his trial and appellate counsel and the source of said funds, and if at liberty prior to conviction, the amount and source of the bail money.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

March 1, 1988 PEOPLE v FULLAN, DANIEL Mot.No. 1332